Supreme Court, U.S.
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No. 00 21

In The Supreme Court of the United States

JOSEPH ROSS, by his next friend and Conservator, Geneva Ross,

Petitioner,

v.

UNUM LIFE INSURANCE COMPANY OF AMERICA, a foreign corporation doing business in the State of West Virginia,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

I. PETITIONER PRESENTED A PROOF OF LOSS, SUBMITTED TO AN INDEPENDENT MEDICAL EXAMINATION, AND RESPONDED APPROPRIATELY TO REQUESTS FOR INFORMATION. RESPONDENT TERMINATED BENEFITS PRIMARILY ON THE BASIS THAT THE INSURANCE POLICY WAS VOID DUE TO ALLEGED MISINFORMATION ABOUT PETITIONER'S INCOME AND SECONDARILY BECAUSE PETITIONER WAS ALLEGEDLY NOT DISABLED. PETITIONER PROVIDED ADDITIONAL INFORMATION, LEADING RESPONDENT TO REINSTATE THE DISABILITY BENEFITS.

DID THE COURT BELOW ERR IN HOLDING THAT PETITIONER FAILED TO FULFILL A CONDITION PRECEDENT WITH RESPECT TO THE CLAIMED BENEFITS DURING THE ONE-YEAR SUSPENSION?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND
STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

REASON FOR GRANTING THE WRIT 9

THE DECISION BELOW REFLECTS A FUNDAMENTAL MISUNDERSTANDING REGARDING THE "PROOF OF LOSS" REQUIRED FOR A DISABILITY INSURANCE CLAIM.

CONCLUSION 13

TABLE OF AUTHORITIES

Collard v. Smith Newspapers, Inc.,
915 F. Supp 805 (S.D. W.Va., 1996) 9

Combined Ins. Co. Of America, 510 S.W.2d 120
(Tex. Ct. Of Civil Appeals, 1974) 12

International Union, Dist. 50 UMW v.
Matthiessen & Healer Zinc Co.,
291 F. Supp. 578 (N.D. W.Va., 1968) 9

Robbert v. Equitable Life Assur. Soc.
Of United States (On Reh),
217 La. 325, 46 So.2d 286 (1950) 12

Sargent v. Holland, 114 F.3d 33 (1997) 12

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in *Joseph Ross Unum Life Insurance Company of America and Carson Insurance Agency, Incorporated* is unreported and is set forth in the Appendix hereto (App. A-1).

The Memorandum Opinion of the District Court for the Southern District of West Virginia in *Joseph Ross Unum Life Insurance Company of America and Carson Insurance Agency, Incorporated,* is unreported and is set forth in the Appendix hereto (App. A-4).

BASIS FOR JURISDICTION

The final judgment of the United States court of Appeals for the Fourth Circuit affirming the decision of the District Court of the Southern District of West Virginia was entered on March 30, 2000. This petition for writ of certiorari is filed within ninety (90) days from that date. 28 U.S.C. Section 2102(c).

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

None.

STATEMENT OF THE CASE

Petitioner, Mr. Joseph Ross (hereafter, Ross), obtained his disability income policy from Unum Life Insurance Company of America (hereafter, UNUM) on January 16, 1992. He was 38 years old and had finished only the 11th grade in high school. Nevertheless, he was employed as a heart pacemaker technician, averaging over $175,000.00 per year in this occupation. Ross' job involved driving approximately 400 to 600 miles a day and/or his flying his single engine aircraft that distance. He was constantly on call by various hospital operating rooms to help implant cardiac pacemakers in a patient while their chest was surgically open. Ross would make electrical calculations and measurements to ensure that the cardiac pacemaker was properly customized for each patient.

The disability insurance policy provided for payment of benefits if Ross became "totally disabled". It defined "totally disabled" as any "injury or sickness [that] restricts your ability to perform the material and substantial duties of your regular occupation to an extent that prevents you from engaging in your regular occupation." The policy further defined "regular occupation" as "your occupation at the time the elimination period begins. If you engage primarily in a

professionally recognized specialty at that time your occupation is that specialty." Petitioner contended that Ross' regular occupation was that of Cardiac Pacemaker Technician and that because he could not perform that job, he was totally disabled under the terms of the policy.

UNUM paid disability benefits under reservation of right to plaintiff from March, 1993, to December 13, 1993. On January 13, 1994, UNUM wrote to Ross and indicated that benefits would be terminated. The trial court characterized the letter as follows (Memorandum Opinion, App. A-16):

> Subsequent to Dr. Taylor's evaluation, Defendant . . . wrote plaintiff to advise that they were terminating payment of benefits. Said letter of January 13, 1994, advised Plaintiff that, pursuant to the terms of the policy, absent further proof of loss no further benefits would be paid.

However, the trial court's review did not fully reflect UNUM's letter terminating benefits. UNUM's letter recited two reasons for termination of benefits. Defendant first indicated that the insurance policy was void, because the statements of income were too high.

> Taking the information you have provided at face value for the purpose of discussion here, it appears you had earned income for personal services (after business expenses) for 1991 of $167,272.00 ($191,200.00 gross - $21,473.00

> expenses). Assuming this figure is correct, had UNUM been aware of the true amount you earned in 1991, it would not have issued policy number LAD176150 as it was applied for.
>
> Assuming, again, the facts noted above are correct, UNUM hereby contests the validity of your policy and declares its intent to rescind policy number LAD176150. The effect of the rescission is to restore both parties to the status quo before the policy was issued. You will be entitled to a full refund of premiums paid on the policy, UNUM will be entitled to a full refund of benefits paid to you to date, and the policy will become null and void.

UNUM's letter then indicated a second reason for termination of benefits. Defendant asserted that Ross was not eligible for disability benefits, because it found discrepancies with regard to his medical condition. As noted by the trial court, this portion of the letter concluded:

> Based on our review of all the information available to UNUM at this time, we are unable to conclude that you qualify for total disability benefits. Absent proof of loss sufficient to override the above noted discrepancies, no further benefits would be payable.

The UNUM letter ended with a "Summary," which clearly demonstrated that the primary reason for termination of benefits was that the policy was void. It said :

> As noted above, we do not currently have a sufficient basis to conclude that medically imposed restrictions and limitations caused by the auto accident prevent you from doing the material and substantial duties of your occupation. That problem is, however, overshadowed by our conclusion that you policy is invalid due to the misrepresentation of your income on your application.

UNUM discontinued payments from December 14, 1993, to December 13, 1994. Thereafter, UNUM reinstated payment of benefits from December 14, 1994, to the present.

Ross brought suit, alleging breach of contract and bad faith failure to pay disability insurance benefits during the period in question. Respondent, Unum Life Insurance Company of American (hereafter, Unum), moved for summary judgment,

The trial court granted UNUM's motion for summary judgment. It found that "Plaintiff cannot show that he fulfilled the requirements of the policy during the period where Defendants denied Plaintiff disability payments." (Memorandum Opinion, App. A-20) The court held that Ross failed to fulfill a condition precedent of the insurance policy. (Memorandum Opinion, App. A-17- A-20)

The lower court found that the insurance policy required the following steps:

1. give notice of Claim . . .;

2. file proof of loss . . .;

3. promptly complete and return any other forms we require; and

4. you undergo a medical examination by a specialist appropriate for the condition or a personal interview as often as we reasonably request while the claim is pending. We reserve the right to select the examiner. We will pay for the examination.

We will evaluate the claim and either:

1. pay the benefits specified in the policy; or

2. notify you and any Loss Payee that benefits are not payable and why. If we need more information, we will tell you and any Loss Payee what we need.

(Memorandum Opinion, App. A-5)

The trial court concluded, "Plaintiff failed to provide Defendant any additional documentation until nearly 11 months after the letter of denial was received." For this reason, the court concluded that petitioner failed to comply with a condition precedent.

The United States Court of Appeals for the Fourth Circuit affirmed the district court.

REASONS FOR GRANTING THE WRIT.

THE DECISIONS BELOW REFLECT A FUNDAMENTAL MISUNDERSTANDING OF THE CONTRACTUAL REQUIREMENT REGARDING THE "PROOF OF LOSS."

Initially, plaintiff observes that the trial court was obliged to give the benefit of the doubt to the opponent of the motion for summary judgment. The moving party must show that there are no genuine issues as to any material of fact and that the movant is entitled to such judgment as a matter of law. Collard v. Smith Newspapers, Inc., 915 F.Supp.805 (S.D.W.Va., 1996). If there is any doubt as to the existence of a genuine issue of fact, that doubt must be resolved against the party moving for summary judgment. International Union, Dist. 50 UMW v. Matthiessen & Heaeler, Zinc Co., 291 F.Supp. 578 (N.D.W.Va.,1968)

Here, the trial court's decision is without basis.

The trial court examined the insurance policy and focused on the plaintiff's duty to provide information to the defendant insurance company. The lower court found that the insurance policy required the following steps:

1. give notice of Claim . . .;

2. file proof of loss . . .;

3. promptly complete and return any other forms we require;

and

4. you undergo a medical examination by a specialist appropriate for the condition or a personal interview as often as we reasonably request while the claim is pending. We reserve the right to select the examiner. We will pay for the examination.

We will evaluate the claim and either:

1. pay the benefits specified in the policy; or

2. notify you and any Loss Payee that benefits are not payable and why. If we need more information, we will tell you and any Loss Payee what we need.

(Memorandum Opinion, App. A-5)

From this review of the insurance policy, the trial court drew the conclusion that, upon defendant's termination of benefits, plaintiff should have provided more information to defendant. The trial court's conclusion cannot survive scrutiny.

First, UNUM informed Ross that the insurance policy was void. Manifestly, there was no information that Ross could have provided to UNUM concerning his medical condition that had any bearing on UNUM's determination that the policy was void. Therefore, it was illogical to hold that plaintiff was obliged to forward additional proof of law to UNUM after the January 13, 1994 letter.

Even assuming (contrary to fact) that UNUM had terminated insurance payments solely because it concluded that Ross was not impaired, the trial court's analysis is flawed. UNUM terminated benefits. It did not request further proof of loss, or return of forms, or submission to a medical examination or interview, or request more information.

The trial court effectively held that Ross was mandated to guess that the insurance carrier wanted additional information and to further guess what information would prove persuasive, despite the fact that the claim had been denied. After the termination of benefits, Ross' counsel presented more information to UNUM, presumably in the hope of reinstatement of benefits and/or payment of past due benefits. Surely, it was appropriate for Ross' counsel to present additional information to UNUM. Unquestionably, this additional information cannot preclude the suit, based on the contention that it should have been presented earlier. Plaintiff vigorously submits that he complied with the claim procedures described in the policy. The trial court's conclusion to the contrary was simply wrong.

The trial court confused and intermingled two distinct counts: (1) breach of contract, and (2) bad faith failure to pay a claim. (Memorandum Opinion, App. A-22) This is

shown by the trial court's perception of plaintiff's theory of liability. The court observed:

> Plaintiff failed to provide Defendant any additional documentation until nearly 11 months after the letter of denial was received. At such time as Defendant received the additional documentation, payments were resumed and have continued to date.
>
> Plaintiff assumedly [emphasis added] contends that, based upon the medical records available prior to January of 1994, Defendant could not reasonably dispute the severity of Plaintiff's disability. The Court finds that based upon Dr. Taylor's evaluation alone Defendant had reason to question Plaintiff's claim.

(Memorandum Opinion, App. A-18)

For Count I, breach of contract, petitioner did not contend, and was not required to contend, that respondent "could not reasonably dispute the severity of Plaintiff's disability." Petitioner alleges (and is required only to allege): (1) the existence of the disability policy; (2) Ross was disabled; (3) petitioner complied with all contractual requirements, particularly the proof of loss; (4) respondent denied the claim. See, Robbert v Equitable Life Assur. Soc. of United States (On Reh), 217 La. 325,46 So.2d 286 (1950), Sargent v Holland, 114 F.3d 33 (1997), Combined Ins. Co. of America, 510 SW2d 120 (Tex. Ct. of Civil Appeals,

1974). There is no basis for the trial court's holding, in logic or in legal precedent, that petitioner must prove that respondent unreasonably denied the claim.

Predicated upon its erroneous perception of the elements of petitioner's claim, the trial court found "that several factors may reasonably have caused UNUM to question the nature of Ross' impairment . . . ." (Id., p. 12; App. 191) However, for Court I, it is entirely irrelevant whether there were one, several, or many factors that could have reasonably caused UNUM to challenge the claim. The trial court reversibly erred, as did the appellate court below. The order of summary judgment must be reversed.

CONCLUSION

WHEREFORE, petitioner herein, JOSEPH ROSS, by his next friend and Conservator, GENEVA ROSS, by and through LOPATIN, MILLER, FREEDMAN, BLUESTONE, HERSKOVIC & DOMOL, respectfully prays that this Honorable Court grant his Petition for Certiorari to the United State Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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TABLE OF CONTENTS

Opinion of the United States Court of Appeals for the 4th Circuit A-1

Memorandum Opinion of the District Court for the Southern District of West Virginia A-4

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

JOSEPH ROSS, by his next friend and
Conservator, Geneva Ross,
Plaintiff-Appellant,

v.

UNUM LIFE INSURANCE COMPANY OF
AMERICA, a foreign corporation
doing business in the State of West Virginia,
Defendant-Appellee,

and

No. 98-2460

CARSON INSURANCE AGENCY,
INCORPORATED, a West Virginia corporation,
Defendant.

Appeal from the United States District Court
for the Southern District of West Virginia, at Charleston.
Elizabeth V. Hallanan, Senior District Judge.
(CA-95-570-2)

Argued: January 25, 2000

Decided: March 30, 2000

Before WIDENER, LUTTIG, and MICHAEL, Circuit Judges

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Richard Eric Shaw, LOPATIN, MILLER, FREEDMAN, BLUESTONE, HERSKOVIC, HEILMANN & DOMOL, Southfield, Michigan, for Appellant. John Campbell Palmer, IV, ROBINSON & MCELWEE, Charleston, West Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Joseph Ross appeals the district court's award of summary judgment in favor of the defendant, Unum Life Insurance Company of America (Unum), in Ross's action alleging breach of an insurance contract (a disability income policy) and bad faith failure to pay or settle an insurance claim. We affirm.

In November 1992 Ross filed a claim of total disability with Unum. After making payments under reservation of right for about a year (March through December 1993), Unum discontinued benefits. The company notified Ross by letter dated January 13, 1994, that it believed he had falsified income information on his insurance application and that his policy was therefore invalid. The Unum letter also stated that the company lacked sufficient information to conclude that

Ross was disabled. Unum informed Ross that he could provide additional information in support of his claim, but that failure to do so within thirty days would result in the policy being rescinded. Ross did not provide new information until November 1994, approximately eleven months after Unum's letter. Unum resumed making payments to Ross, effective December 1994, but it made no payments for the period (about eleven months) when it lacked information. It is the period of non-payment that is in question in this case.

The district court concluded that Ross had failed to provide sufficient proof of loss as required by the policy for the period when Unum did not make payments. As the district court noted, compliance with the terms of the policy is a condition precedent to any right of action by the insured. See Thompson v. West Virginia Essential Property Assurance Ass'n, 186 W.Va. 84, 87 (1991). Because Ross did not satisfy a condition precedent (he did not establish proof of loss for the period in dispute), the district court was correct in awarding summary judgment to Unum. Accordingly, we affirm on the reasoning of the district court. See Joseph Ross v. Unum Life Insurance Company of America, Civ. Action No. 2:95-0570 (S.D. W.Va. Sept. 17, 1998).

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT CHARLESTON

JOSEPH ROSS, by his next friend
and Conservator, GENEVA ROSS,
Plaintiff,

v. Civil Action No. 2:95-0570

UNUM LIFE INSURANCE COMPANY OF AMERICA,
a foreign corporation doing business in the State of West Virginia, Defendant.

MEMORANDUM OPINION AND ORDER

Currently before the Court is Defendant UNUM Life Insurance Company's Motion for Summary Judgment. Having reviewed said motion and accompanying memorandum in support, Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Defendant's Reply Memorandum, all attached exhibits and the relevant case law, the Court is prepared to issue its ruling.

I

On January 16,1992, Plaintiff Joseph Ross obtained a disability income policy ("the policy") from Defendant. The policy was to compensate Plaintiff in the event that he became totally disabled and thus unfit to perform the duties of his regular occupation, pacemaker technician. To make a claim, the policy required the following steps be taken:

1. give notice of Claim ... ;
2. file proof of loss... ;
3. promptly complete and return any other forms we require; and
4. you undergo a medical examination by a specialist appropriate for the condition or a personal interview as often as we reasonably request while the claim is pending. We reserve the right to select the examiner. We will pay for the examination.

We will evaluate the claim and either:

1. pay the benefits specified in the policy; or
2. notify you and any Loss Payee that benefits are not payable and why. If we need more information, we will tell you and any Loss Payee what we need.

(Policy at 10).

On November 7, 1992, Plaintiff was allegedly injured in a single-car accident. There were no witnesses to the accident and the car sustained no body damage other than a broken driver's side door window. According to Plaintiff's Fiancé' and Guardian Carla Hepler, earlier in the evening of the alleged accident Plaintiff had taken her automobile to Montgomery Wards to investigate some unexplained vibrations. After having had the car worked on, Plaintiff phoned Ms. Hepler, at approximately 8:30 p.m. to advise that the car continued to vibrate, and accordingly he was contemplating returning to Montgomery Wards to have the

automobile looked at again. Plaintiff asked Ms. Hepler, to give him the store's phone number and further informed her that, after seeing about the car, he was continuing on to the airport and would then proceed home.

At approximately 10: 00 p.m. Ms. Hepler, called the airport to inquire as to whether anyone had seen Plaintiff. She was informed that no one had. After one fruitless attempt to locate Plaintiff by calling one of his friends, Ms. Hepler, called 911 at approximately 10:30 p.m. Ms. Hepler, related the evening's events to the 911 operator, it had now been approximately two hours since she last spoke with Plaintiff, and inquired as to whether there had been any accidents reported. The operator responded that there had not.

Ms. Hepler, went on to declare that sometime between 1:30 and 2:00 a.m. on November 8, 1992 she heard a knock on the door. Standing on the doorstep was Plaintiff and an unidentified male who had brought him home. All Ms. Hepler, recalls of this good Samaritan is that he was African-American. She does not know his name, how he was dressed, or what type of vehicle he arrived in. Ms. Hepler, described Plaintiff at that time as having wet clothes, glass in his hair, and blood on him. He was also noted as being ill (vomiting) and incoherent. Ms. Hepler, took Plaintiff to Charleston Area Medical Center (hereinafter "CAMC") where he was admitted early in the morning of November 8, 1992.

An initial Glasgow Coma Scale reading was taken shortly after Plaintiffs admission. Plaintiff initially registered at 13 out of a normal 15. In the afternoon of that same day, Plaintiff improved to 15. Having refused therapy, Plaintiff was discharged from CAMC on November 11, 1992.

According to the CAMC discharge summary, CT scans taken of Plaintiffs Brain and abdomen were described as essentially normal, with no abnormalities.

After Plaintiffs discharge from CAMC he continued to complain of nausea, vomiting, confusion and disorientation. Plaintiff was thereafter seen by Dr. Alfredo Velasquez who, on November 25, 1992, administered a follow up Cranial CT scan which revealed no abnormalities.

Dr. Velasquez in turn referred Plaintiff to Dr. Julio Teodoro, who examined Plaintiff on December 2, 1992. Dr. Teodoro, found no remarkable physical impairments and concluded that Plaintiff suffered from post traumatic depression. Based upon his conclusions, Dr. Teodoro, referred Plaintiff to Dr. Warren Rogers, a psychiatrist, who evaluated Plaintiff on December 21, 1992 and January 11, 1993.

Dr. Rogers concluded that Plaintiff's judgment was impaired, that he was suffering from an Organic Personality Syndrome, and was "Status Post Head Injury secondary to motor vehicle accident...." (Rogers Evaluation at 5). However, Dr. Rogers' report additionally declared: "Please note that this was a 'face value' exam and no investigation into possible malingering was performed. Since there is a possibility for litigation involving this case and apparently a large disability policy in effect, detailed neuropsychological testing is recommended." (Id.)

On November 30,1992, Plaintiff's brother, Gary Ross, telephoned Defendant to give notice of the claim for disability benefits under the policy. Defendant began processing the claim on December 2, 1992. On December 14, 1992, Defendant received the signed claim form which

included the Attending Physician's Initial Report, prepared by Dr. Teodoro, on December 9, 1992. Said report diagnosed cerebral concussion, cervical strain, and depression. Dr. Teodoro, concluded that Plaintiff was disabled and described the length of time until Plaintiffs return to work as undetermined. Dr. Teodoro, suggested that a conservative course of treatment be followed.

By letter dated December 21, 1992, Defendant advised Plaintiff that his policy was within the contestable period and therefore Defendant would be attempting to verify representations made at the time of application. To do so, Defendant would require a number of Plaintiffs past tax returns. Defendant was telephonically informed by Gary Ross that he was unable to locate his brother's returns. Although alternate arrangements were made for the location and delivery of said tax records, they were never supplied to Defendant.

Sometime in February, 1993 UNUM Claims Examiner Lawrence Cattani conducted an at home interview with Plaintiff. Mr. Cattani noted inconsistencies in Plaintiff's behavior, along with other unusual events, which prompted him to conclude that: "although I am not a trained medical person, I am a competent observer. I will report that the insured's actions during our meeting seemed inconsistent with the stated impairment." Cattani Report at 4). Notwithstanding Mr. Cattani's concerns, on March 1, 1993, Defendant advised Ms. Hepler, that they would begin paying Plaintiff disability benefits under a reservation of rights.

On March 2, 1993, Mr. Cattani initiated an investigation into Plaintiffs claim. Said investigation included surveillance conducted by Equifax Claim Insurance

Services. On April 29, 1993, Plaintiff's van was vandalized. Equifax observed Plaintiff engage in a detailed dialogue with the police officer sent to investigate. On May 5, 1993, Equifax videotaped Plaintiff as he took his van in for appraisal. Plaintiff assisted the adjuster in examining the inside of the van, and then proceed to drive the van away. Equifax's observations remain uncontested.

In early June, 1993 Plaintiff retained legal counsel to assist him with his claim against Defendant. Counsel referred Plaintiff to physciatrist Susan Bertrand and neuropsychologist Larry Rutledge. On June 17, 1993, Dr. Rutledge evaluated Plaintiff. The results of said examination were as follows:

> In the evaluation sessions, Mr. Ross was almost totally unresponsive ... Mr. Ross was unable to recite 3 digits in forward order when given 4 trials. He was unable to repeat a list of 4 words when given 6 trials. For fluid speech, in attempting to describe a drawing with cueing, he was unable to discern the significant aspects related to the simple drawing. He was unable to name simple objects like a kite, a horseshoe or an anchor. He was unable to do simple arithmetic like how much is 15 + 7.
>
> On the Booklet Category Test, he was unable to apparently understand the instructions. The Symbol Modalities Test was given and Mr. Ross had no responses which were correct. This placed him more than 3 standard deviations below that which would be expected. Trail Making Test Part A was

> discontinued after 5 minutes and 30 seconds with Mr. Ross being unable to complete the test. This was a profound degree of impairment. Part B was not administered secondary to his low level of cognition.
>
> Mr. Ross was administered a Bernoulli Test for malingering since his performance was so poor. The rationale behind the Bernoulli Test is that responses significantly below chance are very unlikely. Mr. Ross' responses to a simple yes/no Bernoulli Test were at chance.

(Rutledge Evaluation at 1).

Dr. Bertrand, whose report Plaintiff relies on heavily, conducted her evaluation on June 18, 1993. Dr. Bertrand concluded that Plaintiff was suffering from a severe head injury requiring extensive brain injury rehabilitation. A review of the Outpatient Evaluation prepared by Dr. Bertrand in conjunction with the June 18 evaluation indicates that Dr. Bertrand's interaction with Plaintiff was somewhat limited. For example, Plaintiff was unable to provide Dr. Bertrand with any history relating to his medical care or medications. However, Ms. Hepler, who accompanied Plaintiff to said evaluation was able to fill in the missing history. The Outpatient Evaluation goes on to state:

> Much of the standard physical examination was unable to be completed secondary to Mr. Ross not willingly participating or not participating in any parts of the examination that did not relate directly to his arm or his

> arm pain. Attempts to test other functional systems directly led to the repeated statements of his problems being limited to his arm and wanting to fly his plane ... Memory and cognitive functions were not assessed specifically during this examination because of Mr. Ross' agitation with any attempt to evaluate him beyond his left arm complaints. Since neuropsychological testing is underway, this issue was not pressed."

(Bertrand Outpatient Evaluation at 3-4). Dr. Bertrand's report further indicates that following the examination Ms. Hepler, provided her with additional information regarding Plaintiff's inappropriate social behavior. Ms. Hepler, also indicated that Plaintiff "was unable to be left alone because he desired to drive and he has not demonstrated that he has that capability." (Id.)

On June 24, 1993, then counsel for Plaintiff James Peterson wrote Mr. Cattani to advise Defendant of his representation of Plaintiff, and contemporaneously referenced Defendant's contemplation of denying benefits. Mr. Peterson subsequently suggested that Defendant should allow for an independent medical examination. Mr. Peterson further requested that Plaintiffs monthly disability benefits of $7,500.60 be maintained pending said examination. During this time, Defendant continued to engage in surveillance. Videotaped surveillance witnessed Plaintiff engaging in a number of physical and social activities during this time, including driving his van on August 14,1993.

On November 18, 1993, Mr. Cattani advised that an independent evaluation had been scheduled at Western

Psychiatric Institute and Clinic at the University of Pittsburgh Medical Center. Counsel for Plaintiff had no complaints to this arrangement. Between November 30 and December 13, 1993, Plaintiff was evaluated by Dr. Craig Taylor.

In Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, Plaintiff's current counsel declares that Dr. Taylor's report indicated that Plaintiff indeed suffered a closed head injury and exhibits symptoms consistent with such a mild to moderate closed head injury. In making such an analysis, counsel has dreadfully misrepresented Dr. Taylor's findings. In pertinent part, Dr. Taylor's report reads:

> Throughout his hospitalization, Mr. Ross remained disoriented to place and time, and when asked how old his son was he stated on several occasions that he was eight years old but shaved. He did not learn this physician's name, though told repeatedly, yet he was able to learn where his room, bathroom and kitchen were located and how to use the TV remote control. He was able to glean that he was on a Unit where people had behavioral disturbances and remarked, 'I'm not crazy like these people.' In addition, during one meal he spontaneously went to a cupboard which had been only recently reorganized and appropriately selected jam and applied it to his toast.

...

He was unable to count dots placed on a card and it took him I minute and 20 seconds to recite the alphabet with 6 errors. His performance resembled that of individuals exhibiting profoundly impaired attention and/or delirium ... Mr. Ross performed quite poorly on two tasks that are relatively easy even for patients who are profoundly, cognitively impaired. He recalled nothing on a Rey 15-Item Memory Test, which is a simple test easily performed by individuals who have profound amnesia. Additionally, his pattern performance on dot counting tasks were inconsistent across items when compared with other's performance. On the surface, Mr. Ross' cognitive function would appear profoundly impaired yet his overall pattern of performance is inconsistent with profoundly poor attention and/or delirium. It is extremely unusual for individuals with poor attention and/or delirium to maintain their attention and task set across a delay. Moreover, such individuals typically exhibit profound and consistent memory impairment except on the simplest of tasks. Mr. Ross failed a simple memory test yet was able to retain other information across a delay. Taken together, these data suggest a volitional component to his performance and expressed deficits.

Based on a careful review of the medical records ... it appears that Mr. Ross has sustained a mild to moderate traumatic brain injury, with initial symptoms that are consistent with such a brain injury.

While Mr. Ross appears to have sustained a mild to moderate brain injury his current level of functioning does not appear to be consistent with an injury of this degree.... Mr. Ross' performance on neuropsychological testing is so poor that we are unable to ascertain his true level of cognitive functioning. If Mr. Ross' performance on cognitive testing were a true indication of his cognitive functioning, this would indicate severe dementia or a profound chronic delirium. However, his behaviors on the Unit are not consistent with this level of cognitive functioning.... For example, Mr. Ross demonstrated ... ability to bath (sic), clothe and feed self, recall consistently where his room, bathroom and kitchen were located, navigate the Unit purposively, with no evidence of wandering, appropriately use a remote control to operate the television, be fully continent, ... recalled 2 out of 3 items after 20-minute delay while being unable to perform two simple cognitive tasks that even the most impaired individuals can perform

appropriately. I do not feel there is evidence for a delirium, dementia or depression severe enough to cause this level of cognitive impairment. In addition, there appeared to be no other physiological factors which could account for this degree of cognitive disturbance.

In addition ... a video of Mr. Ross taken on August 14, 16, 1993 was viewed by myself and staff. In the video, Mr. Ross appears to be fully alert and able to direct attention, appearing nondistractable, to have organized and goal directed behavior, and to maintain interaction with those around him. At one point he is seen moving a full size van from one spot to another in a very organized and deliberate manner. He is also observed to be driving the vehicle on another occasion and to be involved in the sustained task of picking tomatoes in a field, with no assistance. These behaviors as viewed in the video are not consistent with the behaviors displayed on the Unit, and are certainly not consistent with the level of cognitive functioning displayed during neuropsychological testing.

It is my opinion that Mr. Ross is exaggerating his cognitive disturbance or fictively presenting himself as severely cognitively impaired. Because of Mr. Ross' lack of verbal

> communication and poor effort in testing situations, we are unable to assess psychological factors which may underlie his exaggeration of symptoms or fictive representation.
>
> My feeling is that he does not evidence complex partial seizures.

(Taylor Report at 4-7). It is apparent that, contrary to Plaintiffs suggestion that Dr. Taylor's report supports his position, Dr. Taylor felt Plaintiff was malingering.

Subsequent to Dr. Taylor's evaluation, Defendant, who had consistently been paying Plaintiff disability benefits in the amount of $7,500.00 per month since March, 1993, wrote Plaintiff to advise that they were terminating payment of benefits. Said letter of January 13, 1994, advised Plaintiff that, pursuant to the terms of the policy, absent further proof of loss no further benefits would be paid. In April 1994, Mr. Peterson and his law firm ceased representation of Plaintiff.

On October 25, 1994, attorney John Hackney advised Defendant that he was representing Plaintiff. In November 1994, Mr. Hackney forwarded additional proof of loss to Defendant. On February 6, 1995, Defendant issued Payment of $14,872.00 for the period December 13, 1994 to February 7, 1995, and has continued making monthly payments under a reservation of rights ever since.

II.

Plaintiff's Amended Complaint alleges claims for breach of contract and bad faith failure to pay or settle a claim. Essentially, Plaintiff claims that Defendant's failure to pay him disability benefits during the period December 14, 1993 to December 13, 1994, represents a breach of contract. As chronicled above, Defendant's paid Plaintiff said benefits from the claim date until December 1993, reinstated payments in December of 1994, and have continued to make payments ever since. In addition to the claim for breach of contract, Plaintiff alleges that the acts surrounding Defendant's decision to terminate benefit payments, as well as the act itself, constitute bad faith.

III.

Pursuant to West Virginia case law, in order to recover for breach of an insurance contract Plaintiff must show compliance with the terms of the policy as relates to the filing and payment of claims. Morgan v. Insurance Co. of North America, 146 W. Va. 868, 871 (1961) Meeting the conditions of the policy "is a condition precedent to any right of action thereon...." Id.

The terms of the policy clearly indicate that as part of the claim process Plaintiff is to undergo reasonable medical evaluations. The policy further indicates that after review of all pertinent materials, including said evaluations, the Defendant would notify Plaintiff of their decision regarding payment of the claim. Should Defendant determine that requirements of the claim, specifically a showing of proof of loss, were not met, the policy states that Plaintiff would be

required to submit additional evidence should he wish Defendant to reverse its decision.

Defendant, after having reviewed the pertinent evidence of loss, including the evaluation of Dr. Taylor, notified Plaintiff in January of 1994 that they were denying his claim. Plaintiff failed to provide Defendant any additional documentation until nearly 11 months after the letter of denial was received. At such time as Defendant received the additional documentation, payments were resumed and have continued to date.

Plaintiff assumedly contends that, based upon the medical records available prior to January of 1994, Defendant could not reasonably dispute the severity of Plaintiffs disability. The Court finds that based upon Dr. Taylor's evaluation alone Defendant had reason to question Plaintiff's claim. While Dr. Taylor determined that initially Plaintiff appeared to have suffered a mild to moderate closed head injury, and at one time may have exhibited symptoms consistent with such an injury, he was unable to determine Plaintiffs true current state of disability secondary to Plaintiff's profound embellishment and magnification of impairment. In fact, Dr. Taylor testified that the only thing he could determine with certainty about Plaintiff's overall condition was that he was exaggerating his symptoms. Based upon Dr. Taylor's evaluation, Defendant reasonably concluded that it could not determine that permanent disability benefits were warranted, and thus denied Plaintiff's claim pending further evidence.

Perhaps Plaintiff believes that his claim should never have dragged on to the point of an evaluation by Dr. Taylor being required; that based upon the medical evidence prior to

Dr. Taylor's evaluation Defendant should have simply approve the claim. While the Court agrees that insurance companies should not be allowed to unreasonably put claims on hold until such time as a sympathetic doctor supporting the insurance company's position can be found, the Court finds that not to be the situation here.

Rather, the Court finds several factors which may reasonably have caused Defendant to question the nature of Plaintiffs impairment, such as: Plaintiffs initial hospital records which indicated no severe impairment and CT scans taken prior to discharge that were similarly negative; the subsequent indeterminate evaluations of Drs. Velasquez and Teodoro; Dr. Rogers' determination that Plaintiff lacked all insight and suffered from impaired judgment, coupled with his statement that he had conducted only a "face value" examination, and accordingly recommended more detailed neuropsychological testing; Mr. Cattani's in home interview with Plaintiff which raised certain suspicions and lead to surveillance which revealed Plaintiff engaging in events that were simply inconsistent with the zombie-like profile he was at times portraying; the testing conducted by Dr. Rutlege which portrayed Plaintiff as profoundly impaired to an extent wholly inconsistent with his initial injury, as well as contradictory to Plaintiffs level of functioning as illustrated by the surveillance videos; and Dr. Bertrand's evaluation which, while concluding that Plaintiff was severely impaired, indicated that Dr. Bertrand had been unable to perform much in the way of an examination, and relied heavily upon Ms. Hepler for details relating to Plaintiffs medical history and social awkwardness. The Court therefore finds there was reasonable need for Dr. Taylor's independent medical

examination, which was in fact requested by Plaintiffs.

Accordingly, the Court finds that as Plaintiff cannot show that he fulfilled the requirements of the policy during the period where Defendants denied Plaintiff disability payments, Plaintiff is likewise unable, as a matter of law, to show Defendant breached the insurance contract during that December, 1993 to December, 1994 period.

IV.

This District has recently pronounced the summary judgment standard as follows:

> The moving party has the burden of establishing that there is not (sic) genuine issue as to any material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). This Burden can be met by showing that the nonmoving party has failed to prove an essential element of the nonmoving party's case for which the nonmoving parry will bear the burden of pro (sic) at trial. Id. 477 U.S. at 322. If the moving party meets this burden, according to the United States Supreme Court, "there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." Id. at 323.

> Once the moving party has met this burden, the burden shifts to the adverse party to produce sufficient evidence for a jury to return a verdict for that party.
>
> > The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury cold reasonably find for the plaintiff. The judge's inquiry, therefore, unavoidably asks whether reasonable jurors could find, by a preponderance of the evidence, that the plaintiff is entitled to a verdict.
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> Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Cox v. Norfolk and Western Ry. Co., 998 F.Supp. 679,682 (S.D.W.Va. 1998).

Similarly, the United States Court of Appeals for -the Fourth Circuit has recently held that "the moving party is entitled to summary judgment if the non-moving party has failed to make a sufficient showing on an essential element of the case with respect to which the non[-]moving party has the burden of proof" Beard Plumbing and Heating Inc. v. Thompson Plastics, Inc., No. 95-3198, 1998 WL 461921, at *1 (4th Cir. August 10, 1998).

As expressed in Section III above, the Court has

found that Plaintiff has failed to demonstrate his compliance with the claim procedures prescribed in the policy, which would be required for Plaintiff to prevail at trial. As such, the Court finds that Defendant has met its burden and consequently shifted the burden to Plaintiff to demonstrate that sufficient evidence exists to allow a jury to find in his favor. The Court finds that Plaintiff has failed to meet said burden. Plaintiff has simply attempted to show that Defendant unreasonably terminated his benefits, and as evidence offers the medical records prior to December of 1993. As clearly articulated above, the Court has found that argument to be unpersuasive. Accordingly, the Court finds that Defendant is entitled to summary judgment with respect to the breach of contract claim.

Additionally, as Plaintiff's "bad faith" claims are clearly predicated upon the Defendant's alleged breach of the insurance contract, the Court finds that the Plaintiff cannot, as a matter of law, succeed on his claim filed pursuant to alleged violations of the West Virginia Unfair Trade Practices Act absent the breach of contract claim. As Plaintiff has offered no argument as to the independent nature of the claims, the Court finds that Plaintiff's "bad faith" claim is dependant upon the breach of contract claim which has been decided by this Court in Defendant's favor. As such, the Court finds that Defendant is entitled to summary judgment with respect to the "bad faith" claim.

V.

Defendant, in its Memorandum in Support of Summary Judgment, alleges numerous events which

challenge Plaintiffs veracity, and call into question the extent of his injuries. As an illustration, Defendant contends Plaintiff: Bowled in a league between November of 1992 and March of 1993, and would drive himself to league games; went pheasant hunting with a friend in Nebraska and drove on the return trip in or around December of 1992; and flew to Aruba on vacation in April of 1993, and while there engaged in various activities such as snorkeling. Defendant suggests that none of these activities were revealed to Plaintiffs examining doctors.

Defendant also alludes to Plaintiffs alleged confessions to investigator Lesa Smith, supposedly made in February and March of 1993, that he was faking his injuries. Lesa Smith was at that time working as an investigator for a sizable Charleston law firm. Said law firm had been contacted by Plaintiff for purposes of representation in a possible law suit against Montgomery Wards. After having been informed of Plaintiff's alleged comprehensive confession, the law firm wrote to Plaintiff to advise that they were terminating their representation. While current counsel for Plaintiff attacks the manner in which this alleged confession was obtained and questions admissibility at trial, said counsel in Plaintiff's Memorandum in Opposition to Summary Judgment does not question the accuracy of the confession. However, Plaintiff's Motion in Limine as regards this issue does allege that Ms. Smith's credibility is to be questioned.

In total, the Court finds that while these allegations raised by Defendant could well act as fodder for argument at trial, they serve no useful purpose in the Court's determination as to the instant motion and as such were not

considered in the Court's legal analysis.[1]

VI.

Accordingly, for the reasons detailed above, the Court hereby ORDERS that Defendant's MOTION FOR SUMMARY JUDGMENT BE AND HEREBY IS GRANTED.

The Clerk is directed to mail a copy of this Order to all counsel of record and Carla Hepler, Guardian for Plaintiff Joseph Ross.

IT IS SO ORDERED this 17th day of September, 1998.

/s/

Elizabeth V. Hallanan
Senior United States District Judge

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[1]Because these alleged events came to Defendant's attention after their termination of Plaintiffs benefits, they could not have been used as rationale for said termination. As the Court was considering whether Defendant breached the insurance contract at the time of termination of benefits said alleged events shed no light on the reasonableness of Defendant's actions.